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THE CHAOTIC CONDITION OF THE OPINIONS OF THE COURTS RELATIVE TO THE QUESTIONS AS TO THE DEGREES OF NEGLIGENCE.

A recent opinion by the Supreme Court of Illinois, in the case of Chicago, Rock Island & Pacific Ry. Co. v. Hamler, 215 Ill. 525, upon the question of the degrees of negligence, by the review of the cases therein shows a chaotic state of opinion. The conclusion of the court in that case seems to have partaken much of the bewilderment of the cases cited, and we are not at all surprised that there was a dissenting opinion. The only wonder is that all of the judges did not dissent.

The Illinois court said: "The United States Court of Appeals for the seventh district considered the same question involved in this case in Kelly v. Malott, at the October term, 1904. The suit was for damages on account of the death of a messenger of the Adams Express Company, and the declaration charged that he was killed in a collision that occurred through the gross negligence of the defendant. A contract similar to the one in this case was pleaded and the question was whether the injection of the word 'gross' in the declaration made out a case despite the plea. The court said: 'It seems to us that the whole attempt to classify negligence has resulted from a misapprehension. "Negligence" is merely a word of denial. Care is the positive word. It is a familiar and sound doctrine that there are degrees of care. But care cannot be divided into abstract and absolute classes. The quantum of care required in a particular case is determined from the relations of the parties and the facts of the situation, and is proportionate to the danger reasonably to be apprehended. . . . One who unintentionally fails in his duty and thereby causes an injury should make complete compensation. But to warrant punishment there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. "Willful negligence" is as self-contradictory as "guilty innocence.'"

The Supreme Court of Illinois then goes on to say: "Whether the word willful negligence is proper and consistent or not, there can be no doubt that it is not equivalent to gross negligence, and the question whether exemplary damages shall be awarded does not justify any classification into degrees, since negligence, however gross, will not authorize such damages. A tort must be aggravated by an evil intent to enable a party to recover exemplary damages." The court then cites the case of Milwaukee & St. Paul Ry. Co. v. Ames, 91 U. S. 489, to support the latter proposition. It is to be observed that the Supreme Court of the United States in that case also stated in the same connection: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; the court, therefore, misdirected the jury." The query arises, what if the evidence had shown that there was conscious indifference to consequences, would the court then have reversed the case? The conclusion of the court is irresistibly, that it is a question of evidence and that it would have sustained the court below if the evidence had shown a "conscious indifference to consequences." This case is an authority on the side of those courts, which hold that there should be no degrees of negligence set forth in a declara-

tion or petition; that the question of the right to recover exemplary damages is one of evidence. As is stated in the Cyclopedia of Pleading and Practice, Vol. 14, p. 338, under the head of the degrees of negligence: "The complaint in an action of negligence need not allege the degree of the negligence as this is a matter of proof. Ramsey v. Louisville, etc., R. Co., 89 Ky. 99. Therefore it is not necessary to allege the negligence was gross even when the right to recover depends upon the degree; and the characterization of an act, as having been done 'recklessly and willfully' is mere surplusage." Moore v. Drayton (Sup. Ct.), 40 N. Y. St. R. 933. To same effect: Highland, etc., R. Co. v. Sampson, 112 Ala.; McCord v. High, 24 Iowa, 336; Taylor v. Holman, 45 Mo. 371; Panton v. Holland, 17 Johns. (N. Y.) 92.

The conclusion of the Illinois court in the principal case that, "the only question in any case is whether there is actionable negligence, and if there is, the authorities establish the proposition that the rights of the parties are not affected by any question of the degrees of such negligence. The instructions that the contract was not a good defense in case the jury found the defendant guilty of gross negligence were incorrect and should not have been given,"—seems to us to be altogether against the weight of authority and not based on sound principle. There is no question but that there is a great difference between the degrees of negligence. When a court says that, "negligence and willfulness is as unmixable as oil and water" and that, "willful negligence is as self-contradictory as guilty innocence," it has taken a large proposition on ts hands to sustain, as against the weight of authority and sound reasoning. Negligence is defined by Webster as "an omission of duty." Therefore, if a person having a duty to perform willfully or knowingly fails to per form it, it follows, as twice two is four, that ihe is guilty of willful omission of duty or will ful negligence, and it is impossible to see upon what ground the term "willful negligence" can be regarded as absurd as "guilty innocence." It is the guilty mind that makes the crimes not the unconscious deeds of the body. The term gross negligence has a meaning and a place in the law. It means "a conscious indifference to cons quences" or "willful neglect" etc.

In section 7465 of Thompson's Commentaries on the Law of Negligence, under the subhead "Willful" and "Gross Negligence," we find the words "'gross' 'wanton' or 'criminal' qualifying the word negligence in a complaint for personal injuries which does not otherwise support a claim for exemplary damages are regarded as surplusage." This shows that the term gross negligence has a significance but qualifies it by saying "generally a complaint alleging injury by gross negligence of the defendant without alleging that the injury was inflicted willfully, wantonly or through malice will not suffice to charge willful negligence." The work goes on to say: "*Willful injury must be averred*, and a complaint which charges simple negligence, merely, will not allow proof of this grade of negligence, the characteristic of which is, that a recovery may be had notwithstanding contributory negligence." It also says: "Some courts refuse a recovery where the declaration charges that the act complained of was wanton and willful and the proof discloses simple negligence"—citing Wabash R. Co. v. Kingsley, 177 Ill. 558, 52 N. E. Rep. 951, 5 Am. Neg. Rep. 554; 13 Am. & Eng. R. Cas. (N. S.) 835; Highland Ave., etc., R. Co. v. Winne, 93 Ala. 306. "But," Judge Thompson says in a note to the above, that, "it has been held that, where plaintiff alleged willful and reckless negligence in causing the accident which injured live stock being shipped on defendant's railroad he had the right to prove gross negligence." Chicago, etc., R. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. Rep. 1095. The irresistible logic of opinion in his last case is, that if gross negligence were charged in the declaration and willful and reckless negligence were proved or either, it would be ground for recovery of punitive damages, and this opinion is based on the case of the Chicago & N. W. Ry. Co. v. Chapman, 133 Ill. 96, from which the court, in the Calumet case, quotes: "A common carrier cannot, even by express contract, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants or employees. Whatever the rule may be elsewhere, in this state the common

carrier cannot contract for exemption from responsibility for a failure on its part, or that of its servants, to exercise ordinary care in the transaction of its business. If it may by contract, limit its liability for *gross negligence* or willful misfeasance to any extent, it may contract for total exemption." Here gross negligence is placed upon the same ground as willful misfeasance, so that it logically follows from this case, that a charge of gross negligence alone, would warrant a recovery for willful misfeasance.

These cases are not even referred to in the principal case and yet they may have been the foundation of the declaration in question in that case. It is not to be wondered at, that there is so much complaint, by Illinois attorneys of the constantly increasing conflict of opinion in that state. It shows that the judges are not giving careful attention to their own previous opinions. There seems to be absolutely no excuse for a change of base, by the court, where the consequences to the profession, relying upon former opinions, are so important. Such instability must cause, as it is causing in many states, a distrust in its courts. It logically follows that the judges either are so pressed for time that they do not take that which is necessary for careful consideration, or there is a lack in some other respect. But the opinions in the Illinois cases, prior to the principal case, find company in the case of Decker v. McSorley, 116 Wis. 643, which holds that: "No mere degree of carelessness or inadvertence constitutes gross negligence, and that the term 'gross negligence' signifies willfulness, involving intent, actual or constructive, to cause injury, and if one is guilty of willful misconduct causing injury to another the former's fault is denominated gross negligence." Rideout v. Winnebago Traction Company (Wis.), 101 N. W. Rep. 672. The irresistible logic of these Wisconsin cases result in the conclusion that if gross neglect is charged in the petition or declaration, it would sustain proof of willfulness; consequently, it would follow both from these and the Illinois cases, that the proof of willful negligence would overcome that of contributory negligence or be ground for punitive damages.

We approve the Wisconsin and the previous Illinois opinions and conclude with our learned predecessor, Judge Seymour D. Thompson, that there are two degrees or kinds of negligence. 1 Thompson on Negligence, sec. 18. But we would say (1) that one may be denominated simply, negligence; the other, gross negligence. Under the term gross negligence, we would say, it would be proper to introduce any evidence which tended to show the right to recover punitive damages under the conditions upon which punitive damages are allowed in the jurisdictions in which a suit may be brought to recover that character of damages. (2) We would conclude from the authorities that a charge of gross or willful, or wanton, or culpable negligence would be mere surplusage, unless any one of these charges were shown to be true by the evidence. That would be to say that with these terms used in a declaration or petition, in a suit where the proof should show mere negligence, the proof of it, without proof of contributory negligence, would permit a recovery of compensatory damages. Under a charge of gross negligence, not only compensatory damages could be recovered but punitive damages also, if the proof were sufficient; or, that one is entitled to recover notwithstanding his own contributory negligence. This seems to us not only reasonable but logical. The object of charging gross, willful, wanton, etc., negligence, is for the purpose of giving notice to the defendant that the plaintiff is seeking to recover punitive damages. There is no reason why this should not be simplified by using the term gross negligence, which would comprehend any or all these terms. To charge negligence and allow under it a right to prove willful or wanton injury, therefore, a right to recover punitive damages, does not give the notice to the defendant to which he is entitled, and for that reason is objectionable. We think the rule we have drawn from the Wisconsin and Illinois cases, decided prior to the principal case, and thosecases which hold that, unless the right to recover punitive damage is shown where the declaration charges gross, willful, wanton, etc., negligence, such charges should be regarded as mere surplusage, where, in such case s, mere negligence is proven, is the correct one.

NOTES OF IMPORTANT DECISIONS.

QUO WARRANTO—DISCRETION OF COURT TO WITHDRAW LEAVE OF ATTORNEY-GENERAL TO SUE AFTER LEAVE HAS ONCE BEEN GRANTED.—The extent of the discretionary power of a court to refuse or withdraw leave of the attorney-general to bring a proceeding of *quo warranto* has always been a subject of some controversy. In the recent case of State v. Village of Kent, 104 N. W. Rep. 948, the Supreme Court of Minnesota lines up with the prevailing authority by holding that this discretion of the trial court is exhausted in the first grant of leave to sue.

The opinion of the court is interesting and valuable on this particular point. The court says: "It is contended that, even if the court had any discretion in the matter of allowing the information to be filed and the writ to issue, it was exhausted when the court once exercised its discretion and allowed the information to be filed and the writ to issue, and nothing thereafter remained for it to do but try and determine the issues of law and fact in accordance with the rules of law as in ordinary cases. In People v. Regents, 24 Colo. 175, 49 Pac. Rep. 286, Mr. Justice Campbell said: 'The authorities seem to be unanimous that, when once the discretion of the court in which the proceeding is brought has been exercised and the permission given to relator to file an information, such discretion is exhausted, and may not be recalled; but, on the contrary, the court must then proceed to determine the controversy the same as any other upon the law and facts.' In Spelling, Extr. Rem., vol. 2, § 1777, it is said: 'Where, however, the court has in the exercise of its discretion permitted the information to be filed, its discretionary power is thereby exhausted, and the issues of fact and law as presented must at the trial be determined according to the strict rules of law as in ordinary cases.' In State v. Brown, 5 R. I. 1, the court said: 'The discretion to allow in such a case the filing of an information of this character is, as we apprehend, all the discretion which courts of authority justify. When the information is filed, all the discretionary power of the court is expended.' To the same effect are High, Extr. Rem. § 606; People v. Golden Rule, 114 Ill. 34, 28 N. E. Rep. 383; People v. Paisley, 81 Ill. App. 52; Place v. People, 83 Ill. App. 84; State v. Elliott, 13 Utah, 200, 44 Pac. Rep. 248; State v. Shank, 36 W. Va. 230, 14 S. E. Rep. 1001. And see Rex v. Brown, 4 T. R. 276. Mr. Justice Campbell's statement that the authorities seem to be unanimous is hardly correct, as there are cases which hold that this discretionary control remains with the court until the case is finally determined, and that where leave is improvidently given the court may, upon the hearing, refuse relief upon the same grounds upon which it might originally have refused leave to file the information. People v. Wild Cat Special Drainage Dist., 31 Ill. App. 223; People v. Hamilton, 24 Ill. App. 609; State v. Hoff, 88 Tex. 297, 31 S. W. Rep. 290; State v. Claggett, 73 Mo. 388. We are of the opinion that the court exhausts its discretion when it exercises it upon the preliminary application for leave to file the information This presumes, however, that the court actually exercises its discretion, and does not deprive it of the right to dismiss the proceedings if it subsequently appears that it acted improvidently or through inadvertence and under a misapprehension of facts. Gilroy v. Commonwealth, 105 Pa. 484; Commonwealth v. Kistler, 149 Pa. 305, 24 Atl. Rep. 216. Under such circumstances no judicial discretion is exercised."

IS THERE AN UNWRITTEN CONSTITUTION IN THE UNITED STATES?—ARE ACTS OF THE LEGISLATURE VOID BECAUSE VIOLATIVE OF COMMON RIGHT?

Constitutions do not create personal rights; they declare them. Long before state or federal compacts were adopted, the people possessed inherent rights of life, liberty, property and security which underwent no essential change when promulgated by the written constitution. Early in the history of the United States it was fashionable for courts to preach from the text that all laws violative of "common right," the "social contract" or of "natural justice" were *ipso facto* void. After an interval of many years the doctrine has been revived and the stone which the courts rejected has become a head in the political corner; for the stump orator declaims upon the "genius of American institutions" and "the spirit of the constitution," directing or forbidding legislative and governmental action. This heresy finds its authority in two ancient judicial statements, the one of Lord Hobart, who says, "even an act of parliament, made against natural equity, as to make a man judge in his own case, is void of itself; for *jura naturae sunt immutabilia*, and they are *leges legum*;" [1] the other of Sir Edward Coke who, to his subsequent regret, declared that "it appears in our books that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament

[1] Day v. Savadge, Hobart's Reports, p. 85, 87a

is against common right and reason, or repugnant or impossible to be performed the common law will control it and adjudge such act to be void."[2] The quotation from Hobart, given above, is scarcely more than *obiter dictum*, as he decided that the act of parliament in question, when properly construed, did not apply to the case. Coke's comment was subsequently qualified and explained by himself and when taken in connection with his other utterances, means only that laws are to receive a construction, even though forced, which shall render them reasonable in their operation.[3] Basing their opinion upon these unstable foundations, eminent judges and publicists have departed out of their way to announce that there is an unwritten constitution, controlling the acts of state and federal legislatures; and that any law which is against natural right and justice is void, although there be no express or necessarily implied provision of a written constitution governing the case. Among the American colonists prior to and at the time of the passage of the stamp act, a belief was current that acts of parliament could be held void because oppressive and unreasonable.[4] As early as 1789, South Carolina had said that "there are certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made against those principles, they are null and void. For instance, statutes made against common right and reason are void; so statutes made against natural equity are void."[5] Nine years later, Justice Chase of the Supreme Court of the United States announced that "there are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power * * * an act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[6] These utterances were reinforced by John Marshall who said: "it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative powers."[7] Justice Johnson in the same case of Fletcher v. Peck followed Marshall's doubt with an absolute affirmance: "I do not hesitate to declare that a state does not posess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the deity."[8] After the lapse of seventeen years, a judge of the United States Supreme Court spoke his personal conviction upon this subject by asserting, "no state court would, I presume, sanction and enforce an *ex post facto* law, if no such prohibition was contained in the constitution of the United States; so neither would retrospective laws taking away vested rights be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded."[9] Two years later appeared a discussion by Joseph Story: "In a government professing to regard the great rights of personal liberty and property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded or that the estates of its subjects were liable to be taken away without trial, without notice and without offence. * * * We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union."[10] In the argument of Daniel Webster, made in the same case, he took occasion to say: "If, at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end of private property; though there may be no prohibition in the constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact,

[2] Dr. Bonham's Case, 8 Reports, 118a.

[3] See Rowles v. Mason, 2 Brownlow and Golds, 197 198, Co. Lit. 115b, 272b; Harbert's Case, 3 Reports, 13b'

[4] Note to Paxton's Case, Quincy's Reports 51, Appendix 1,520 (Mass.); Robin v. Hardaway (Va.), Thomas Jefferson's Report, 114.

[5] Ham v. McClaws (S. Car.), 1 Bay, 93, 96.

[6] Calder v. Bull (1798), 3 Dallas, 386, 388.

[7] Fletcher v. Peck (1810), 6 Cranch. 87, 135-136.

[8] Fletcher v. Peck, at page 143.

[9] Thompson J., in Ogden v. Saunders (1827), 12 Wheat. 212, 304.

[10] Story, J., in Wilkinson v. Leland (1829), 2 Pet. 627, 657-658. (The peculiar facts of the case justified the above observations, as the law in question was controlled by the Rhode Island charter, which required all laws to conform to the laws of England.)

such as giving the property of A to B." [11] Finally, like one born out of due time, is presented a case decided in 1902 by the highest court of Kentucky, in which it is held, that an act of the legislature is void, which fixes the salaries of city firemen in cities of a given class, because such legislation is or may become unreasonable and oppressive; the court remarking "we do not think such legislative interference in a matter in which no one but the firemen and the tax payers of the city can possibly be interested, could have been in contemplation of the framers of our constitution or of voters who sanctioned its adoption." [12] Other courts, judges and text writers have expressed their confident belief in an unwritten constitution which overrides unjust or inequitable legislation. [13]

Despite the deliberate opinions of Marshall, Thompson, Chase, Story, Von Holst and Webster, and the official utterances of the justices of Connecticut, Kentucky, Maryland, Massachusetts, New Hampshire, New York, South Carolina and Vermont, the doctrine announced above has been repudiated again and again by the courts of this country. The concensus of their opinion is expressed by Judge Cooley when he says, "the principles of republican government are not a set of inflexible rules, vital and active in the constitution, although unexpressed. * * * Nor are courts at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words." [14] With our courts and legislatures constituted as they are, any other result would unsettle laws and undermine government itself. None of the three departments, state or federal, is answerable to either of the others for its mistakes in matters of expediency, nor are its errors of judgment as to the wisdom of ways and means reviewable by any authority save the people. If the governor indiscreetly orders out the militia and entails expenses and loss of life upon the citizens, his acts cannot be declared unlawful by legislature or court. If the courts decide a case erroneously, induced thereto by considerations of what they deem public policy, the legislature cannot reverse the decision of the judiciary. Neither ought the judiciary to assert *their* judgment concerning the public welfare in place of that of the *legislature* for the members of the latter are in a better position to discover the public need of a given law than are the judges, in the majority of instances. More numerous than is the court, aided by public debate, by the perusal of newspaper discussions, the correspondence of constituents, by conversation with fellow members, the arguments made before committees and the reports of the committees themselves, the legislators are in possession of facts which can never be brought before the judge; of evidence inadmissible in a court of law, but which would be conclusive in the practical affairs of men. It is therefore a usurpation of power, unjustifiable from any standpoint, for the courts to declare the acts of a legislature unconstitutional and void because "impolitic," "unjust," "unreasonable" or "against natural right."

[11] Webster *in arguendo*, Wilkinson v. Leland, 2 Pet. 627, 646-647.

[12] City of Lexington v. Thompson, 68 S. W. Rep. 477, 57 L. R. A. 775. (The case could have been properly decided upon another and strictly constitutional ground, viz., taking property without due process of law and without compensation.)

[13] Von Holst, Const. Law, p. 271; Goshen v. Stonington, 4 Conn. 209, 225; Welch v. Wadsworth, 30 Conn. 149, 155; Camp v. Rogers (1877), 44 Conn. 291, 296; Regents v. Williams (Md.), 9 Gill and J. 365, 408; Campbell's Case, 2 Bland (Md.), 209, 231-232; Ross' Case, 2 Pick. 165, 169; Foster v. Essex Bank, 16 Mass. 245, 270-271; Opinion of Justices, 4 N. H. 565, 566; Earick v. Smith, 5 Paige Ch. 137, 159; Cochran v. Van Surlay, 20 Wend. 365, 373; Taylor v. Porter, 4 Hill, 140, 144-145; Powers v. Bergen, 2 Selden (N. Y.), 358, 367; Bradshaw v. Rodgers, 20 Johns. 103, 106; Morrison v. Barksdale (S. Car.), 1 Harper Law Rep. 101, 102; Lyman v. Mower, 2 Vt. 518, 519; Hatch v. Railroad, 25 Vt. 49, 66.

[14] Cooley's Const. Lim. 5th ed. 202-204; Dorman v. State, 34 Ala, 216, 231-232; Avery v. Pima County, (Ariz. 1900), 60 Pac. Rep. 702; Flint River Co. v. Foster, 5 Ga. 194, 201; Powers v. Inferior Court, 23 Ga. 65, 77; Merchants' Co. v. Brown, 64 Iowa, 275, 20 N. W. Rep. 434; Churchman v. Martin, 54 Ind. 380, 384 4 Cent. L. J. 343; State v. McClelland, 138 Ind. 395, 399, 37 N. E. Rep. 799; State v. Gerhardt, 145 Ind. 439, 450-451, 44 N. E. Rep. 469, 33 L. R. A. 313; Townsend v. State, 147 Ind. 624, 634, 47 N. E. Rep. 19, 37 L. R. A. 294; State v. Bolden, 107 La. 116, 31 S. W. Rep. 393; Leonard v. Wiseman, 31 Md. 201; People v. Gallagher, 4 Mich. 243; Lommen v. Gaslight Co., 65 Minn. 196, 68 N. W. Rep. 53, 33 L. R. A. 437, 43 Cent. L. J. 209; Hamilton v. St. Louis Co. Ct., 15 Mo. 3, 23-24; Sharpless v. Mayor, 21 Pa. 147, 161; Commonwealth v. Moir, 199 Pa. 534, 49 Atl. Rep. 351, 53 L. R. A. 837.

If there be such an unwritten restriction upon legislative action, what are its limits? No court has ever attempted to define its provisions, and in the nature of the case there could be no definition. It would change with every fluctuation of public sentiment, and a law passed a hundred years ago, which would have been invalid because unjustly interfering with lotteries or slavery, would to-day be considered highly just and commendable. Nor is there need of resort to an indefinite, unwritten constitution in a country where the people govern themselves. The legislature is the mouthpiece of the people and the real danger of oppressive and flagrant abuse of power is so slight as to be inappreciable. If, in adopting a written constitution, the people have not seen fit expressly to curb the legislature in special directions, but, by a bill of rights or enunciation of principles, have restrained them from other abuses, the maxim *expressio unius est exclusio alterius* applies and the general assembly, by necessary implication, is left free to abuse or to respect the confidence reposed in it. But it is said that some things are too clear to need expression and the fact that the legislature has never been told that it must not act tyrannically, should not give it the right to act unjustly; but on the contrary it must be assumed the people did not intend to bestow on their representatives the ability to commit a wrong. It may be answered, that legislatures are the agents of their principal, who is the public at large. Their authority extends to enacting laws for the public welfare and to them is delegated the power of determining what conduces to the general weal. If they honestly err, or if they abuse their power, it is only the familiar instance of an agent acting within the scope of his authority and binding his principal.

It is not, however, to be supposed that we are forbidden ever to travel outside of the literal language of a constitution to ascertain its effect. There are implied terms which are either naturally or necessarily connected with its express provisions and are as much a part of the instrument as are the latter. Hence it is that the Supreme Court of the United States interpreted the word "necessary," used in the federal constitution, to mean "properly adapted to," thus laying the foundation for a liberal construction of the national document, in reference to the exercise of governmental functions.[15]

More than this: it is permissible to look at historical conditions existing when the constitution was adopted, to determine the purpose of certain of its parts. Thus it is known that the first eleven amendments to the federal constitution apply only to the United States;[16] that "slavery" and "involuntary servitude," referred to in the 13th amendment, should be construed in the light of the anti-slavery struggle, to mean "personal servitude" only;[17] and the purpose of both the 13th, 14th and 15th amendments has been discovered in the history of the period in which they were adopted.[18] But beyond mere construction we cannot go; and the only rational view appears to be that there are no unwritten terms of the federal or state constitutions in the sense of there being substantive, independent provisions, unconnected with the express terms of the instrument and bestowing or restricting legislative power. It remains true that the unreasonableness or injustice of a law is ofttimes material in determining its effect or validity. If the act is open to two constructions, one of which renders its operation reasonable and the other causes it to operate against common right, the former will naturally be adopted, though it be a forced interpretation. Hence, a statute which held the "owner" of a vehicle liable for injuries resulting from negligence of the driver, was considered unreasonable, if read literally, and the word "owner" was construed to mean "occupant" or one in actual possession of the carriage.[19]

If the act be unjust and oppressive, this fact may reveal that the legislature has attempted to wield a power which could be rightly used within proper constitutional

[15] McCulloch v. Maryland, 4 Wheat. 316.

[16] Cooley's Princ. Const. Law, pp. 218-219; Barron v. Mayor of Baltimore, 7 Pet. 243; Monongahela Co. v. United States, 148 U. S. 312; United States v. Rhodes, 1 Abbott, U. S. 28.

[17] Slaughter House Cases, 16 Wall. 36.

[18] Strauder v. West Virginia, 100 U. S. 303, 10 Cent. L. J. 225; *Ex parte* Virginia, 100 U. S. 339; People v. King, 110 N. Y. 418, 18 N. E. Rep. 245, 1 L. R. A. 293; Davidson v. New Orleans, 96 U. S. 97.

[19] Camp v. Rogers, 44 Conn. 291; Case of Alton Woods, 1 Rep. 41, 47; Cromwell's Case, 4 Rep. 13; United States v. Cantril, 4 Cranch. 167; Sullivan v. Adams, 3 Gray, 476.

limits, but which, if colorably exercised, falls under the ban of the express terms of the constitution. Thus, states are by necessary implication, forbidden in the federal compact to interfere with interstate commerce; yet they retain a large police power whose operation may tend to restrict such commerce. They may therefore protect the health of the inhabitants by regulations of domestic and imported food products; but should this regulation be colorable only, and be unsupported by any reasonable considerations of public policy, the act would be void, not because it was unreasonable, but because, stripped of its disguises, it is a clear violation of the interstate commerce clause of the constitution, art. 1, section 8.[20] So, too, the state may pass proper regulations concerning the suffrage, requiring an educational or property qualification, or limit it to one sex.[21] But if it enact a law whose obvious intent is to disfranchise the negro on account of his race, this is unreasonable and cannot be said to fall within the power of the state over the subject of the suffrage; yet it is invalid not because of its injustice, but because of the 13th, 14th and 15th amendments to the federal constitution.[22]

Again, the states may pass laws respecting the enforceability of contracts, and may even forbid their execution. But if a law interdicts a contractor from entering into any agreement whereby he shall pay his workmen their wages less frequently than once every week, the act is void, not because it is against common right (though this it certainly is), but because it deprives the contractor of liberty without due process of law, contrary to the 14th amendment to the federal constitution.[23] The case of taking A's property and giving it to B (the favorite illustration employed by those who maintain there is an unwritten constitution requiring all laws to be just), is a clear instance of unconstitutional legislation, but such a law is void, not by reason of its flagrant injustice, but because the 5th and 14th amendments forbid depriving any person of his property without due process of law or of the equal protection of the laws. An *ex post facto* law is unquestionably unjust, but it is void, not because it violates a shadowy "spirit of American institutions," but because the Federal Constitution, art. 1, section 10, declares that no *ex post facto* law shall be passed.[24] Laws of a state may seriously interfere with the enforcement of contracts, even though already entered into; but if this interference, instead of being confined to the remedy, amounts to an impairing of their obligation, the acts are invalid, not because they are against "common rights" (though such they may be), but for the reason that the framers of the constitution saw fit to say that no law impairing the obligation of a contract should be enacted by a state.[25] If a statute attempts to impose harsh and unreasonable restraints on citizens of other states who enter the enacting state, it is unenforceable, not because the "genius of republican government" or "the social compact" discountenances it, but because Article 4, section 2 of the Federal Constitution announces that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[26]

Upon the whole it may be said that the phrases employed by the writers first above quoted, though mouth-filling and sonorous, are misleading and unnecessary, and that whatever may be the condition of our English cousins, whose parliament is supreme, our state legislatures are restricted only by the express terms of the state and federal constitutions and by those implied terms which are naturally or indispensably connected with the language therein contained; and that the United States congress is restrained not by any fanciful, unwritten constitution, but by the fact that, unlike the state legislatures, it is a creature of special, limited and delegated powers and that, unless its authority is found in some express or implied provisions of the federal constitution, its acts are void.

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[20] Railroad v. Husen, 95 U. S. 405; Schollenberger v. Pennsylvania, 171 U. S. 1; Collins v. New York, 171 U. S. 30.

[21] Minor v. Happersett, 21 Wall. 162.

[22] *Ex parte* Yarbrough, 110 U. S. 651.

[23] Leep v. Railway Co., 58 Ark. 407, 25 S. W. Rep. 75, 23 L. R. A. 264, 38 Cent. L. J. 529; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. Rep. 62, 22 L. R. A. 340, 37 Cent. L. J. 409.

[24] *Ex parte* Garland, 4 Wall. 333.

[25] Const. Art. 1, sec. 10.

[26] Roby v. Smith, 131 Ind. 342.

SELF-DEFENSE—DUTY TO RETREAT.

STATE v. GARDNER.

Supreme Court of Minnesota, Nov. 24, 1905.

In a trial for homicide in which there is an attempted justification by self-defense, it is reversible error to charge that such justification cannot be made out unless the accused in good faith endeavored to escape, although the jury was also instructed that he was not necessarily bound to retreat, where the proven circumstances preclude any practicable means of escape or retreat without great increase in peril of death or of great bodily harm.

The application of the doctrine of "retreat to the wall," originating, as it did, before the general introduction of firearms, has due reference to the difference in danger between a hand to hand encounter with fists, clubs, or even knives, and an encounter in an open space, involving the use of repeating rifles by men experienced in handling them.

JAGGARD, J.: The defendant and appellant, Gardner, a homesteader in what is still a vast wilderness in the northern part of this state, was a typical pioneer, industrious, courageous, and self-reliant. He was a postmaster and mail carrier at the time of his arrest. The best citizens of the neighborhood in which he then lived and in which he had formerly lived testified to his good reputation. His character was that of a quiet, peaceable, law-abiding man. He had had trouble with William Garrison, living alone on a piece of land 2 1-2 miles north of his place. Garrison, apparently a hardy man, of violent temper and quarrelsome disposition, and thoroughly familiar with the use of a rifle, on many occasions, and to a large number of different persons, had expressed his malice and hatred for the defendant, and his intention to kill him. Many of these threats were communicated to the defendant. At one time when this was done, the defendant said: "Well, we'll use him the best we know how; perhaps he will change." Garrison was 35 years of age, 5 feet 8 or 10 inches in height, weighing 175 to 180 pounds, and was very strong and active. Gardner was about 45 years of age, 5 feet 6 1-2 inches in height, weighing about 138 to 142 pounds. In the spring of 1904, defendant had purchased hay stumpage of lands east and adjoining Garrison's land. He informed Garrison of this purchase, who then said he would not allow Gardner to haul that hay. Both parties became angry, and had hot words. Garrison again told the defendant that he would never haul that hay. On July 18, 1904, Gardner returned from Hibbing shortly before noon, and lay down on his bed. His son about noon wakened him, and told him, that several days before Garrison, who had come to get some potatoes stored by consent in Gardner's roothouse, had directed him (the son) in Gardner's own words, "to tell your father when he comes home that he cut six tons of hay on my land last year, and to send him right down as soon as he comes home. I don't care whether Backus Brooks pays or he pays for it, so that I get my money." Gardner also said he hadn't started to cut hay yet, but that he was going to start tomorrow. Thereupon defendant arose, put on his clothes, took his rifle, a compass, according to some, but not all, of the testimony, some mail belonging to Garrison, and the auditor's receipt for the payment of the hay stumpage. He testified that with no purpose of doing Garrison any harm, he intended to run the lines between the sections with Garrison, to show Garrison the receipt, and to prove that he had not cut any of Garrison's hay, and owned the hay stumpage for the year 1904. On his way, he saw that Garrison had cut some hay belonging to him. This made him angry, and he approached Garrison's place cursing, but heinsists with the thought only that he would prosecute Garrison, and make him pay for the hay he had cut. He testified: "I can't say that I was extremely angry; I wasn't fighting-angry; I was chewing-the-rag-angry." Reaching Garrison's cabin, while going north, he found Garrison looking south, and standing astride a pole he was working on. Garrison saw him, and, immediately facing him, moved over to the west side of the poles. At the same instant, defendant noticed Garrison's rifle leaning against the house or a stump. The distance between Gardner and Garrison was 32 feet; the distance between Garrison and the gun was 30 feet; the distance between Gardner and the gun was 20 feet. Gardner said to Garrison, with an oath, "Who told you to cut that hay, Bill"? Garrison leaped across the poles towards his gun, saying, as Gardner understood, "I'll show you." His face was distorted with passion, and he appeared to Gardner to be very angry. Gardner then called to Garrison, with the emphasis of an oath, "Hold on." Garrison jumped three feet towards his gun, and kept on going in that direction. At this time Gardner's gun was at rest in the hollow of his arm. He testified, in his own language, he knew that "Garrison was intending to get his gun to shoot me." To save his own life, thinking only of that, he fired at Garrison, and missed him. Garrison turned partially towards the defendant, commenced to maneuver by leaping back and forth and sideways, and was dodging in that way or going over a fence when defendant fired a second shot, which caused his death. A third shot was accidentally fired. Gardner finally found Garrison some distance away, stood over him, and with a horrible imprecation said: "You have been working for this for some time, and now you have it." He took Garrison's gun, went to his own house, sent one Otterman to Garrison's, and then walked and rode on a borrowed horse to Hibbing. There he caused a telegram to be sent to the sheriff of Itasca county at Grand Rapids, reading: "William Garrison shot in 64-23. Bring coroner and prosecuting attorney." Meanwhile Otterman having gone to Garrison's house, found that Garrison had crawled into bed,

and was the solitary witness of his death. Just before his death, Garrison said: "If he (Gardner) had not shot me, I would have shot him. I guess the cur got my gun." When the sheriff and county attorney arrived, Gardner, who had been talking quite freely and not always consistently to a number of people, began to tell them about the tragedy. He was very properly and fairly cautioned by the county attorney as to the danger of that course, and that what he said might be used against him upon trial for murder. He persisted, explained the circumstances fully, accompanied the officers of the law to the scene of the tragedy, and there went over the details with them, indicating all the various places at which the different scenes occurred. Defendant was indicted for the crime of murder in the first degree. The verdict was guilty of murder in the second degree, and judgment was entered upon the verdict that the defendant be confined at hard labor in the State Prison for the term of his natural life.

This case presents a state of facts peculiar to frontier life. All the direct evidence of what happened at the time of Garrison's death was supplied by the defendant himself. He had told many persons of the tragedy. His statements varied somewhat, but not materially. The circumstantial evidence was not conclusive as to either his guilt or innocence. A most significant part of the evidence was the character of the wound itself. The autopsy showed two wounds in Garrison's body, one of entrance and one of exit. Both were on the front surface of the body. The wound of entrance was a large tear in the throat, almost immediately below the thyroid cartilage or Adam's apple. From that point the wound extended downward to the left, and made its exit below and to the right of the left axilla or armpit. The state contended that it could only have been inflicted while the deceased was stooping over at his work, as he threw up his chin when he heard the accused approach, and insisted that all the circumstances indicated that the accused stole up on the dead man unarmed, and deliberately and maliciously shot him while in this position. On the other hand, counsel for the accused insist that the wound could have been produced while the dead man was working sideways away from the defendant, and was ducking and dodging up and down and sideways. The defendant assigns as one point of error that the trial court refused to allow him to demonstrate before the jury, but putting a man of the same size and weight as Garrison in the same position, that the wound could not have been produced in the way the state claims. It is ordinarily within the discretion of the trial court to determine to what extent he will permit such demonstrations to be made before the jury. We are not prepared to hold that the court in this case abused such discretion. It is, however, usual and proper to exercise greater liberality in permitting such demonstrations where homicide cases are on trial than in ordinary civil suits. The assignments of error based upon alleged mistakes in the admission of evidence are not of such a nature as to entitle the defendant to a new trial. Of these, one is a clear case of erroneous admission of hearsay evidence upon a point not sufficiently material to have in any reasonable way affected the judgment of the jury. Another assignment is based upon an alleged error which arose in cross-examination, after evidence had been received on behalf of defendant to the effect that the witness had never heard anything against the reputation of the accused in the locality in which the witness lived, as to his being a quiet, peaceable, and law-abiding citizen. Upon cross-examination the court overruled an objection to this question directed to the witness: "Have you ever heard before that the defendant was engaged in any altercation, or had been engaged in any altercation, with any person or persons in which firearms were used"? The answer was: "I heard of the incident. I did not hear that he shot at anybody. I heard that he had discovered some men stealing goods out of his sleigh, and he caught them, and delivered them to the authorities in Duluth." The witness afterwards said that he placed that incident to Gardner's credit. If there was error in this question —which it is unnecessary, and, it seems, undesirable, to decide here—it is obvious that not only did it not prejudice the accused, but the result was rather favorable to him. It is the settled rule of this court that upon such mere technical errors, which do not result in prejudice to the accused, and which can in no reasonable way affect the result of the trial, this court will not grant a new trial in criminal prosecutions. State v. Nelson, 91 Minn. 145, 97 N. W. Rep. 652; State v. Crawford (N. W., decided this term), 104 N. W. Rep. 822. The assignments of error raise many questions as to the correctness of the charge of the court. The court charged, *inter alia*: "But to justify the taking of human life in self-defense, it must appear from all the evidence that the defendant not only really and in good faith endeavored to avoid an encounter and to escape from his assailant before the fatal shot was fired. * * * The right to defend himself by taking the life of his assailant would not arise until the defendant had at least attempted to avoid the necessity of such an act; but in this connection I also charge you that when he is assailed or threatened he is not necessarily bound to retreat, and whether, under the circumstances of this case, the defendant was justified in doing what he did is a matter for you to determine, and not for the court to decide." We are of opinion that this charge was erroneous in itself (Perkins v. State, 78 Wis. 551, 47 N. W. Rep. 827; Shell v. State, 88 Ala. 14, 7 So. Rep. 40), and was not applicable to the facts proven. The common-law doctrine of "retreat to the wall" is thus referred to in a frequently quoted paragraph from Coke

(3 Inst. 55): "Some be voluntary, yet being done inevitable cause are no felony; as if A. be assaulted by B., and they fight together, and before any mortal blow is given, A. giveth back until he cometh to a hedge, wall, or other strait, beyond which he cannot pass, and then, in his own defense and for safe-guard of his own life, killeth the other; this is voluntary, and yet no felony." The rule on this subject has tended in some American jurisdictions to be enforced with strictness, in others to be largely modified, in accordance with changed conditions, and indeed to be positively relaxed. See State v. Matthews, 148 Mo. 185, 49 S. W. Rep. 1085, 71 Am. St. Rep. 598; Runyan v. State, 57 Ind. 80, 84, 26 Am. Rep. 52. In a leading case (Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733), after a review of the common-law authorities in consequence of this confusion in the later cases, the court, *inter alia*, said: "The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm." The Supreme Court of the United States approved of this rule and of Runyan v. State, *supra*, in 1894, in Beard v. United States, 158 U. S. 550, 15 Sup. Ct. Rep. 962, 39 L. Ed. 1086. In that case an angry dispute arose between Beard and three brothers, one of whom took a shotgun, and went with the others upon the premises of the accused for the purpose of taking away a cow in dispute. Beard returned to his home, taking with him a gun he was in the habit of carrying when absent from home, and finding the brothers on his premises ordered them to leave. This they refused to do. When the deceased got within a few steps of the accused, the latter warned him to stop, but he approached nearer, saying, "Damn you, I will show you," at the same time making a movement with his left hand as if to draw a pistol from his pocket. The accused struck him on the head with the butt end of his gun, and knocked him down, as a result of which he died. Mr. Justice Harlan said: "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon in such a way and with such force as under all the circumstances he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life, or to protect himself from great bodily injury." In Rowe v. United States, 164 U. S. 546, 17 Sup. Ct. Rep. 172, 41 L. Ed. 547, the defendant, a Cherokee Indian, had an altercation with the deceased at a hotel. After a quarrel at the supper table, the accused swore at the deceased and kicked him. The accused then leaned up against the counter, as if, according to his own testimony, he had abandoned the controversy. Immediately the deceased sprang at him, striking him with a knife, cutting him. Thereupon the accused shot and killed his assailant. The trial court charged in a carefully qualified way as to the duty of retreat. Mr. Justice Harlan, *inter alia* said: "The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm; and, under the circumstances, it was error to make the case depend, in whole or in part, upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant, without more seriously wounding him." This accords with the general law on the subject. Harbour v. State (Ala.), 37 So. Rep. 330; People v. Newcomer, 118 Cal. 263, 50 Pac. Rep. 405; State v. Chushing, 14 Wash. 527, 45 Pac. Rep. 145, 53 Am. St. Rep. 883; Babcock v. People, 13 Colo. 515, 22 Pac. Rep. 817; Brown v. Commonwealth, 86 Va. 466, 10 S. E Rep. 745; Cain's Case, 20 W. Va. 679; State v. Evans, 33 W. Va. 417. 10 S. E. Rep. 792; Commonwealth v. Selfridge (Mass. 1806), reported in volume 1, Horigan & Thomp. Self-Def. 1; Pond v. People, 8 Mich. 150; People v. Macard (Mich.), 40 N. W. Rep. 784; State v. Bartlett, 170 Mo. 658, 71 S. W. Rep. 148, 59 L. R. A. 756; Willis v. State (Neb.), 61 N. W. Rep. 258; 25 Am. & Eng. Enc. of Law (2d Ed.) 272, note 2.

The rule of law in this state is not inconsistent with this conception of the duty to retreat so far as is involved in the case at bar. In State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70, Wilson, C. J., said, *inter alia:* "It clearly appears that the defendant deliberately and intentionally shot the deceased, and from this the presumption is that it was an act of murder. * * * Where the party has not retreated from or attempted to shun the combat, but has, as in this case, unnecessarily entered into it, his act is not one of self-defense. The defendant by taking his gun and following after the deceased, without any previous provocation, such as the law will recognize as provocation for the use of a deadly weapon, showed conclusively that the homicide was not committed in self-defense, real or imaginary." In approving this case in State v. Sorenson, 32 Minn. 118, 19 N. W. Rep. 738, in which

the deceased rushed at the defendant with a club, Gilfillan, C. J., said: "The law concedes the right to kill in self-defense, but only in extremity, and when no other practicable means to avoid the threatened harm are apparent to the person resorting to the right. If it was practicable, and so apparent to him, to repel the attempt by other means than by killing his assailant, he is bound to do so. And all the authorities are agreed that ordinarily, as an element of legal self-defense in cases of personal conflict, the party killing must escape by retreat, unless prevented by some impediment or by the fierceness of the assault." The last-named case was approved in State v. Rheams, 34 Minn. 18, 24 N. W. Rep. 302, in which the deceased was unarmed and the defendant had a loaded revolver. In State v. Scott, 41 Minn. 365, 373, 43 N. W. Rep. 62, the evidence was such that no charge that the homicide was justified by self-defense, ignoring the circumstances of provocation by the defendant, would have been correct. The doctrine of "retreat to the wall" had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction. In the case at bar one of the theories of the state was that the defendant shot Garrison while he was at work leaning over the poles. In this view the charge as to escape was not involved, and the subject should not have been referred to. It became relevant only in the consideration of the defendant's narrative of the tragedy. According to that narrative, the accused knew of the threats made by Garrison to kill him. Garrison was only 30 feet away from his rifle, leaning against the house or a log; defendant had more than 100 paces to travel before he could reach the popples surrounding Garrison's curtilage. An attempted retreat finally must have resulted in exposing him to a duel with a dead shot like Garrison. It would not have been reasonable to have required him to have undertaken to reach and take Garrison's gun. Garrison, the larger man, would, as he said, have broken him in two before he could have secured it and protected himself. It was apparently as dangerous for him to retreat as to stand his ground. Duncan v. State, 49 Ark. 543, 547, 548, 6 S. W. Rep. 164. To use the expression of Chief Justice Gilfillan, referred to, if the jury believed the defendant's narrative he had no "practicable means" to avoid threatened harm by an attempt to escape or retreat. "He had no reasonable way open to retreat without increasing his peril." Harbour v. State, *supra*. He had "come to a strait." Coke, *ante*. The fact that Gardner carried his gun did not justify giving the instruction. His contention was that this was in accordance with a natural and the general custom of the wild and unsettled wilderness in which he lived. Moreover, as was held in People v. Macard (Mich.), 40 N. W. Rep. 784, a person knowing his life to be threatened, and believing himself to be in danger of death or great bodily harm, is not obliged to remain at home in order to avoid an assault, but may arm himself sufficiently to repel anticipated attack, and pursue his legitimate avocation; and if without fault, he is compelled to take life to save himself, he may use any weapon he may have secured for that purpose, and the homicide is excusable. And see Bohannon v. Commonwealth, 71 Ky. 481, 8 Am. Rep. 474. It was accordingly reversible error, in any view of the case, for the trial court to have charged upon the subject of escape or retreat. In connection with a new trial, it is desirable to refer to some other parts of the charge. With respect to the grounds of apprehension on the defendant's part, the trial court used on a number of occasions the expression "bound to know." It would have been better for the court to have employed the language of the statute (section 6461) namely: "Homicide is justifiable in the lawful defense of the slayer when there is reasonable ground to apprehend a design on the part of the person slain to commit a felonly, or do some great personal injury to the slayer, and there is imminent danger of such design being accomplished." See Germolus v. Sousser, 83 Minn. 141, 85 N. W. Rep. 946. In connection with the conduct of the deceased in embarking in a quarrel, the case of Wallace v. United States, 162 U. S. 466, 16 Sup. Ct. Rep. 859, 40 L. Ed. 1039, states the law clearly and simply. The court properly excluded from the consideration of the jury the charge of manslaughter. It follows, from a consideration of the circumstances previously set forth and of the defendant's own testimony, that either he committed homicide, or that he killed the deceased in self-defense. The defendant himself testified clearly and positively that at the time of the shooting the only motive which actuated him was his own self-protection. The judgment and order appealed from are reversed, and, in accordance with section 7391, Gen. St. 1894, a new trial is directed. The case is remanded to the district court to that end, and the warden of the Minnesota state prison is hereby directed to deliver the said defendant to the sheriff of Itasca county, to be taken to Itasca county for such new trial.

NOTE. — *Duty to Retreat.* — The reason for the origin of the doctrine of the common law requiring that he who is murderously assailed must retreat to the wall before taking the life of his assailant has never been satisfactorily stated. It certainly has

never been defended by any able argument, nor has any jurist or text writer of repute risen up to defend it. On the contrary, the doctrine has been stamped as puerile and even as making the retreating party guilty of misprision of felony. Bishop, Crim. Law (8th Ed.), p. 850.

In Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52, the court outlined the modification of the doctrine to retreat as follows: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of the person assailed to retreat as far as he can before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee, when assailed, to avoid chastisement, or even to save human life, and that tendency is well illustrated by the recent decisions of our courts bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." And so a charge that "before a man can take life in self-defense he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault," was held error. This doctrine is reiterated in the same court, where the duty of retreating is limited to cases of non-felonious assaults and mutual broils and combats. The court observes: "But if applied to all cases where a person going his lawful way is assaulted, without reference to the question whether a felony or a mere trespass on the person is manifestly intended, it (the duty of retreat) would require a man to flee before another who murderously assailed, or a traveler to flee before a highway robber, or a woman to flee before her would-be ravisher, before resorting to extreme measure of defense. It is safe to say that the law puts upon a person no such necessity. The old writers on 'justifiable homicide'—that is, homicide committed in the resistance of felonies—make no mention of the duty of retreating." The same doctrine was adopted by the Ohio Supreme Court in a case where the subject is learnedly examined, and the decision was that where a person, in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so, without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm. The court remarks: "We can safely say that the rule is at least the surest to prevent the occurrence of occasions for taking life; and this by letting the would-be robber, murderer, ravisher and such like know that their lives are in a measure in the hands of their intended victims."

Other cases holding that the doctrine of retreat had practically been abandoned in the United States are as follows: State v. Evans (Mo.), 28 S. W. Rep. 8; Beard v. United States, 158 U. S. 550; Tillery v. State, 24 Tex. App. 251, 5 Am. St. Rep. 882; Bemarda v. State, 78 Wis. 551; State v. Reed, 53 Kan. 767, 42 Am. St. Rep. 322; State v. Hatch, 57 Kan. 420. See also 45 Cent. L. J. 88.

The doctrine of retreat to the wall, if there ever existed any good reason for it in the days when firearms were not so generally carried, certainly cannot be defended in this day and generation when even the urchin who runs through the streets is not infrequently discovered armed with a "gun." To retreat from a man who assails you with a machine that can send its murderous missile of lead after you for a hundred yards with greater accuracy than a man can use his fists or swing a club, is only requiring the innocent to court further danger from the criminal who seeks his destruction. To avoid a quarrel is proper and is to be commended, but to be compelled to retreat from a murderous and unjustifiable assault by one who holds in his hands a firearm is indulging the wicked assailant to a degree not even called for by Christ's sermon on the mount, and as this sermon calls for the highest state of Christian perfection it is hardly justifiable for the law with all its imperfections to require a higher degree of morality. Moreover, to require a man to retreat under such circumstances, encourages him to court certain death or to commit suicide, a crime in and of itself, and some have argued that a man who runs away from a murderous assault with a firearm should not only be prosecuted for misprision of felony, as Mr. Bishop suggests, but for an attempt to commit suicide. Let the courts have done with this extravagant and unreasonable doctrine of retreat to the wall and let the right of self-defense be determined strictly by the rule whether a reasonable man would under the circumstances of the particular occurrence believe that the deceased intended to take his life or do him great bodily harm or subject him to great public humiliation.

JETSAM AND FLOTSAM.

WHEN SUNDAY IS NOT DIES NON.

Rev. Edgar J. Heilman, of Norristown, Pa., who is being sued for $10,000 damages because in an unguarded moment he asked Miss Blanche Gertrude Keck to be his, and afterwards regretted it, has set up a defense which, if sustained, would throw into confusion all the established methods and traditions of courtship. He alleges that the contract to marry was entered into on Sunday and was therefore void. As Sunday is generally understood to be the day of days for the inception of such agreements, it can readily be seen that many of Pennsylvania's fair ones must be uneasy regarding their rights of action. Fortunately we are able to allay their fears by referring them to Fleischman v. Rosenblatt, 20 Pa. Co. Ct. 512. In that case the ungallant defendant similarly claimed that his promise, having been made on the Sabbath, was void under Pa. Act of April 22, 1794, which forbids the doing or performing on that day of any "worldly employment or business whatsoever," save only works of "necessity and charity." He contended that the contract in question was "business" and was not a work of either "necessity" or "charity." The plaintiff's counsel, however, maintained that an engagement to marry was 'a contract both of necessity and charity, which view the court also adopted. So it is safe to say that no minister of the gospel who on Sundays puts in his spare time between sermons plighting his troth to his fair parishioners can escape retributive justice on the ground that Sunday is *dies non.*—*Chicago Law Journal.*

CORRESPONDENCE.

COMPELLING TRIAL COURT TO CORRECT RECORD BY MANDAMUS.

Editor of the Central Law Journal:

In the issue of the CENTRAL LAW JOURNAL for the 2d inst, we note in the leading article, Compelling a Trial Court by Mandamus, etc., that you confound the Supreme Courts of North and South Dakota. The decision to which you refer was handed down by the South Dakota court and not by the North Dakota court, although you refer to it in three different places as being a North Dakota decision.

Doubtless your attention has been called to this inaccuracy before, but as the same mistake is frequently made and is somewhat annoying to the profession in both the states, we trust repeated attention to it will result in a more careful reading of proof or revision of copy, as the case may be.

ROURKE, KVELLO & ADAMS.

Lisbon, N. Dak.

[We confess the correctness of the charge made by our correspondents and can appreciate the indignation in being held responsible for the decision criticised in our issue of Jan. 21, 1906. We have sometimes thought it a mistake to give two states the same names distinguishing them only by the points of the compass. It confuses proof readers who are compelled to detect a mistake of this kind instantaneously by a remembrance of future references to the same subject. We shall caution our proof readers to be more careful in these respects in the future.—Ed.]

BOOK REVIEW.

WARE'S ROMAN WATER LAW.

If there is one thing more apparent than another, in these days of multitudes of opinions, it is the lack of knowledge of first principles in too great a proportion of them. Judges have a lot of human nature about them, while, at the same time in most of the states, the business of the courts has so greatly increased, that between the tendency of many judges "not to do more work than the law allows," first principles are being rapidly lost sight of. We do not say that there are not many judges who do conscientious work, but we do say that there are too many who do not. The work of Mr. E. F. Ware, on Roman Water Law is one of those works relating to first principles which is no doubt the result of an appreciation of the need of a knowledge of first principles upon the subject upon which he has written, which the courts have failed to recognize, because they are looking for cases "on all fours," rather than to spend the time to look up the law. There is need for such a treatise as this in those parts of the country where questions of this kind are constantly arising, that means to a great extent, in the West. These questions will be presented in many of our new states where the courts are not overburdened with work. They will have time for the careful consideration of all the questions which are brought before them and should render very carefully considered opinions upon the laws relating to waters. This work will be a great help to the lawyers who have questions in hand relating to the subject of this well-considered work. Every well-read lawyer knows the importance of being thoroughly posted upon fundamental principles. These in this work are taken from the Roman law as found in the *Corpus Juris Civilis* of the Emperor Justinian and from the French and Spanish laws which are largely based upon the principles of the Roman law. These laws figure largely in many of our states and are useful commentaries in every state. The table of contents is unusually complete. It is a work of general interest. It concerns Rivers, Rain Water, Drip, Springs, Water Works, Sewers, Reservoirs, Irrigation, Water Rights, Right of Way and Procedure.

It is contained in one well bound volume of 159 pages and is published by the West Publishing Co., St. Paul, Minn.

WALD'S POLLOCK ON CONTRACTS.

Professor Williston's edition of this valuable work will, as it should, find a ready market. It is well said that "no American treatise on the law of contracts has been written by such eminent authorities on the subject as those whose names are connected with this work as authors." Take the Table of Contents and run through the chapters. I. Agreement, Proposal and Acceptance. II. Capacity of Parties. III. Forms of Contract. IV. Consideration. V. Persons Affected by Contract. VI. Duties under Contract. VII. Unlawful Agreements. VIII. Impossible Agreements. IX. Mistake. X. Misrepresentation and Fraud. XI. Right of Rescission. XII. Duress and Undue Influence. XIII. Agreements of Imperfect Obligation. XIV. Discharge of Contracts. Finally an appendix which relates to considerations which are not found in other works. This is in the form of notes which relate to terminology and fundamental conceptions of contract; authorities on contract by correspondence; history of the equitable doctrine of separate estate; authorities on the limits of corporate powers; classification of contracts in Roman and Medieval Law; early authorities on assignments of choses in action; occupations, dealings, etc., regulated or restrained by statute; bracton on fundamental error. Mistake in wills; on the supposed equitable doctrine of "making things good;" French law on "inofficious" gifts and captation; the examination of the above, shows on its face, that this work is one from which each of us may learn something worth while for our work and that it is not only an excellent work for the beginner, but even more excellent, if the term is passable, to the practicing lawyer. In this work the student and the practitioner will discover a new viewpoint. The Law of Contracts, from this viewpoint affords a new meaning and significance relative to many questions.

One of the many striking features of this work, is the simplicity of the language used; another. the clearness of expression of its authors. These two characteristics must commend themselves as well to the practicing lawyer as to the beginner. Let us take an illustration which not only serves to show the truth of the above, but also to show the accuracy of the statement of the law, showing the distinction between an action for restitution and an action on the contract, p. 302: "Another important and frequently neglected distinction is that between an action for restitution and an action on the contract. Since repudiation affords immediate cause for rescission it also entitles the party aggrieved to bring an immediate suit for the restitution specifically or in money equivalent of whatever has been parted with. Cases

allowing this do not involve the consequence that a action might be brought at that time on the contract." Another illustration under the head: "No Inconsistency in Allowing Full Damages Before all Performance Due. As soon as a party to a contract break any promise he has made, he is liable to an action In such an action the plaintiff will recover whatever damage the breach has caused. If the breach is a trifling one such damage cannot well be more than the direct injury caused by that trifling breach. But if the breach is serious or is accompanied by repudiation of the whole contract, it may and frequently will involve as a consequence that all the rest of the contract will not be carried out. This may be a neces sary consequence of the situation of affairs or it may result from the plaintiff's right to decline to let the defendant continue performance, since, even if all the remaining performances were properly rendered, the plaintiff would not get substantially what he bargained for. The plaintiff is entitled to damages which will compensate him for all the consequences which naturally follow the breach and therefore to damage for the loss of the entire contract. This is no different principle from allowing a plaintiff in an action for tort for personal injuries to recover damages he will probably suffer in the future. If the cause of action has accrued, the fact that the damages or all of them have not yet been suffered is no bar in any form of action to the recovery of damages estimated on the basis of full compensation. This is law where the doctrine of Hochster v. De la Tour is denied, as well as where it is admitted." (pp. 302, 303). The criticism of the author of the language of Lord Cockburn, in the case of Frost v. Knight, L. R. 7 Ex. 111, 112, we believe, results from a misunderstanding of its full purport. On p. 350 we find the following: "Lord Cockburn's statement of the plaintiff's second alternative is that 'the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it.' The two clauses of this sentence logically contradict each other. If the contract be put an end to, no action can be brought upon it. If an action may be brought upon it, either at once or any time in the future, it is not put an end to." There is no question in our mind that Lord Cockburn, had he expressed his full thought, would have said: "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, so far as he, the other party, is concerned, and may at once bring an action as on a breach of it." Had he given full expression to his apparent meaning, there is no doubt but that his second alternative would have been as accurately expressed as his first. The authors of this most valuable work are too well known to require further comment as to their ability. Professor Williston has been instructor on the law of contracts in the Harvard Law School for fifteen years. Much of the work has beendone by him and is accurate. The cases fully bear out the text, and the number of American cases cited in the notes show how much work has been done This work is completely Americanized and is fully what it purports to be: A Treatise on the Principles of Contract at Law and in Equity. It is well worth its price and ought to find a place in every law office.

It is published by Baker, Voorhis & Co., New York, and contained in one well and compactly bound volume of 1139 pages.

HUMOR OF THE LAW.

Few admirers of the writings of Thomas Nelson Page, the author of "Mars Chan," "Red Rock," and "Gordon Keith," know that the famous southern writer began his career as a lawyer. Such is the fact, however, and as a young man he practiced law several years at Hanover Court House, Virginia, before he found that literature was not only more to his taste than law, but also more profitable.

Mr. Page confesses that he was not a success at the law, but his experiences around the old court house gave him material for many of his most popular stories. He frequently tells jokes on himself that grew out of his struggles with the law books and the country judges before he made his mark in the literary world. One story that he relates with great relish is of an experience he had with an old negro client soon after he hung out his shingle. The old man had known Mr. Page all his life, and, becoming involved in a controversy regarding a small piece of property he owned, he rode into Hanover Court House one court day and asked Mr. Page to take his case.

They went before the county court, and the case was decided against them. After the decision had been handed down, Mr. Page went over to where the old man was sitting in the court room. "Uncle Jim," as he was called, was greatly disgruntled at the outcome of the trial, and Mr. Page sought to soothe him.

"Now, Uncle Jim," he said, "we lost this case, but if you have got any more money we can appeal to a higher court and win it."

"'Cose I ain't got no mo' money, Marse Tom," was the old darkey's reply.—"Ef I'd a-had any money wuth talkin' about I'd got a good lawyer in de fust place."—*New York Times.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Another Action Pending.—Allowing the same amendment in two suits between the same parties held not objectionable as allowing two suits for same cause of action to be pending.—Pratt v. Rhodes, Conn., 61 Atl. Rep. 1009.

2. ACTION—Money Received by Agent.—Complaint for money received by the defendant of the plaintiff "as his

agent" held one on contract, and not for tort. — Starin v. Fonda, 95 N. Y. Supp. 379.

3. ANIMALS—Unfenced Highways.—The owner of cattle escaping, without negligence of his, while being driven along an unfenced highway over adjoining land to land of another, no fence being between the lands of the different owners, held not liable for damages.—Wood v. Suider, 95 N. Y. Supp. 508.

4. APPEAL AND ERROR—Certifying Judgment.—Where a circuit court affirms a judgment of the probate court, that it does not certify the judgment to the probate court is not ground for its reversal. — Watson v. Pollitzer, S. Car., 51 S. E. Rep. 914.

5. APPEAL AND ERROR—Dedication Deed.—The legal effect of a deed dedicating to the public streets and alleys on land platted as a town site and of a deed granting a railroad a right of way over a street held a question of law for the court.—Oklahoma City & T. R. Co. v. Dunham, Tex., 88 S. W. Rep. 849.

6. APPEAL AND ERROR—Nominal Damages.—The rule that a case will not be reversed to allow the recovery of nominal damages applies only to cases arising *ex contractu*.—Von Schroeder v. Spreckels, Cal., 81 Pac. Rep. 515.

7. APPEAL AND ERROR—Failure to Determine Issues —Where it appeared that an issue tendered by plaintiff had not been determined or abandoned judgment on reversal will not be rendered for defendant, but the cause will be remanded.—Wagner v. Arnold, Ark., 88 S. W. Rep. 852.

8. APPEAL AND ERROR—Findings of Fact. — Rule that supreme court will not disturb findings on matters of fact reasonably sustained by the evidence applies to a finding that a contract created an equitable mortgage. —Stitt v. Rat Portage Lumber Co., Minn., 104 N. W. Rep. 561.

9. APPEAL AND ERROR—Nonsuit.—Where a question for the jury is presented, a nonsuit is technically erroneous, although the court would be justified in setting aside a verdict for the plaintiff.—Yates v. New York Cent. & H. R. R. Co., 95 N. Y. Supp. 497.

10. APPEAL AND ERROR—Supersedeas Bond. — Appeal from a judgment confirming a special assessment cannot operate as a stay, in the absence of an order fixing the amount of the supersedeas bond.—Ahrens v. City of Seattle, Wash., 81 Pac. Rep. 558.

11. ARBITRATION AND AWARD—Fire Insurance. — An arbitration cannot, after it is properly submitted, be defeated by the withdrawal of one of the appraisers during the investigation.—Niagara Fire Ins. Co. v. Boon, Ark., 88 S. W. Rep. 915.

12. ASSAULT AND BATTERY—Carrier Ejecting Passenger.—A declaration in trespass *vi et armis* justifies proof of the commission of an assault by a railway conductor while preventing a person from boarding a train.—Lindsay v. Wabash Ry. Co., Mich., 104 N. W. Rep. 656.

13. ASSIGNMENTS—Depositor's Right of Action to Recover Deposit.—The right of action of depositor in a private bank to sue on the personal obligation of the banker to repay the deposit on demand is assignable.—Johnson v. Shuey, Wash., 82 Pac. Rep. 123.

14. ASSIGNMENTS—Interest Acquired.—Assignment by vendor of an executory contract for the sale of realty to secure debt vests in assignee a lien on the vendor's interest to the extent of the debt, not exceeding the unpaid price.—Lamm v. Armstrong, Minn., 104 N. W. Rep. 804.

15. ASSIGNMENTS—Notice to Debtor.—Notice to debtor of assignment held not necessary to the validity of the assignment as between assignor and assignee.—Virginia-Carolina Chemical Co. v. McNair & Pearsall, N. Car., 51 S. E. Rep. 949.

16. ATTACHMENT—Motion to Vacate.—Where attachment is vacated upon the merits, the general rule of practice, requiring specification of the irregularity relied upon, does not apply to the motion to vacate.—Norden v. Duke, 94 N. Y. Supp. 578.

17. BANKRUPTCY—Jurisdiction of State Courts. — Under Bankr. Act, § 67, subd. "e," a state court held to have jurisdiction of an action to set aside a chattel mortgage given by a bankrupt, though the property had been sold in the bankruptcy proceedings, and the proceeds deposited to await the further action of the federal court.—Vollkommer v. Frank, 95 N. Y. Supp. 324.

18. BENEFIT SOCIETIES—Effect of Change in By-Laws on Beneficiary.—Beneficiaries named in certificate of mutual benefit association cannot be deprived of benefits by subsequent amendments to by-laws.—Evans v Southern Tier Masonic Relief Assn., N. Y., 75 N. E. Rep 317.

19. BENEFIT SOCIETIES—Equity Jurisdiction.—A court of equity held justified in retaining jurisdiction of a suit for relief for which there was an adequate remedy at law.—Hoagland v. Supreme Council, Royal Arcanum, N. J., 61 Atl. Rep. 982.

20. BILLS AND NOTES—Forged Indorsement.—Where an indorsement on a genuine check is forged, and check is paid by a bank not the drawee, which collects it in turn from the drawee bank, the latter indorser guarantees the genuineness of the prior indorsement.—Wellington Nat. Bank v. Robbins, Kan., 81 Pac. Rep. 487.

21. CARRIERS—Care of Baggage.—A carrier, after arrival of trunks at their destination, could not leave them for three days on a station platform exposed to the weather.—Charlotte Trouser Co. v. Seaboard Air Line Ry., N. Car., 51 S. E. Rep. 973.

22. CARRIERS—Carrying Passenger Beyond Station.—Passenger carried beyond station held not entitled to recover punitive damages.—Trapp v. Southern Ry., S. Car., 51 S. E. Rep. 919.

23. CARRIERS—Discovered Peril.— Trespasser on the tracks of a street railroad company held guilty of negligence precluding a recovery except under the doctrine of discovered peril.—Williams v. Metropolitan St. Ry. Co., Mo., 89 S. W. Rep. 59.

24. COLLISION — Negligence of Tug. — A towing tug which cast a barge adrift in the Hudson river in a fog without motive or signalling power, held solely in fault for a collision between such barge and a steamship passing down the river.—The Etruria, U. S. D. C., S. D. N. Y., 139 Fed. Rep. 925.

25. CONSTITUTIONAL LAW—Board of School Examiners —Under Buffalo City Charter, Laws 1891, pp. 210, 211, ch 105, §§ 334, 337, a Jewish applicant for position as public school teacher held not denied the equal protection of the law, or discriminated against because of race, by refusal of board of school examiners to grant her special examination on a day other than Saturday.—Cohn v. Townsend, 94 N. Y. Supp. 817.

26. CONSTITUTIONAL LAW— Legislation Affecting Internal Management of Corporation. — Legislative acts regulating the internal management of a corporation so far as it has reference to the public and concerns the policy of the state are within the reserved power to alter and repeal the charter granted to a corporation.—Hinckley v. Schwarzschild & Sulzberger Co., 95 N. Y. Supp. 357

27. CONSTITUTIONAL LAW—Legislative Restriction on Court's Power.—The legislature has no power to restrict the jurisdiction of superior courts to punish for contempt as it existed at common law.—*Ex parte* McCown, N. Car., 51 S. E. Rep. 957.

28. CONSTITUTIONAL LAW—Right to Act as Executor.— Laws 1897, p. 1, amending section 18 of the Acts 1872 (4 Starr & C. Ann. St. Supp. 1902, p. 32), providing that no nonresident shall be appointed executrix is not depriving a person of property without due process of law.—*In re* Mulford, Ill., 75 N. E. Rep. 845.

29. CONSTITUTIONAL LAW—Statute Prohibiting Marriage of an Epileptic.—Pub. Acts 1895, p. 667, ch. 325, prohibiting marriage by an epileptic, held not to contravene Const. art. 1, § 1, guarantying equal rights.—Gould v Gould, Conn., 61 Atl. Rep. 604.

30. CONSTITUTIONAL LAW—Taxation of Mortgages.—Laws 1905, p. 2059, ch. 729, providing for taxation of mortgages, held not to deny equal protection of law, in violation of Const. U. S. Amend. 14.—People v. Ronner, 95 N. Y. Supp. 518.

31. CONTEMPT—Jurisdiction.—Circuit judge held entitled to issue a rule to show cause in contempt proceedings against party residing in another county, the rule to be returnable therein.—State v. Cape Fear Lumber Co., S. Car., 51 S. E. Rep. 873.

32. CONTRACTS—Consideration.—Where an absolute bequest of the income of an estate was made to the widow, an assignment of a portion of the income to the son to induce him to perform his duty as an executor held without consideration.—Slater v. Slater, 94 N. Y. Supp. 900.

33. CONTRACTS—Provision as to Time for Bringing Action.—Parties to a contract may stipulate that an action for its breach may be brought within a certain period, and, if the prescribed limitation is reasonable, it will be upheld.—Ausplund v. Ætna Indemnity Co., Oreg., 81 Pac. Rep. 577.

34. CORPORATIONS—Compliance with Laws of Foreign State.—A foreign corporation, which has not, at the commencement of an action by it, complied with the corporation laws of the state, may subsequently comply therewith and maintain the action.—Ryan Live Stock & Feeding Co. v. Kelly, Kan., 81 Pac. Rep. 470.

35. CORPORATIONS—Election of Directors.—Equity will determine the legality of an election of directors of a corporation only where the question arises incidentally in a suit of which the court has jurisdiction.—Crow v. Florence Ice & Coal Co., Ala., 39 So. Rep. 401.

36. CORPORATIONS—Personal Liability of Officers.—Officer of corporation held personally liable for loss occasioned to creditor by his act in transferring to the creditor worthless corporate securities for money used by the officer for his private purposes.—Donovan v. Purtell, Ill., 75 N. E. Rep. 834.

37. CORPORATIONS—Promoter's Right to Fees.—Claim for services and disbursements as trustee of corporation held not necessarily inconsistent with claim for participation in promotion fees.—Boice v. Jones, 94 N. Y. Supp. 896.

38. CORPORATIONS—Rights of Surety.—A corporation surety may permit its principal to make default and insist upon its strict legal rights in the same manner as a private surety.—Ausplund v. Ætna Indemnity Co., Oreg., 81 Pac. Rep. 577.

39. CRIMINAL EVIDENCE—Exclusion of Witnesses.—Whether or not a particular witness shall remain in the court room pending the trial of a criminal cause rests in the sound discretion of the trial court.—State v. Mann, Wash., 81 Pac. Rep. 561.

40. CRIMINAL LAW—Confession.—In a prosecution for rape, evidence of inculpatory and exculpatory statements, made by defendants while handcuffed in the custody of sheriff, held admissible.—Dunmore v. State, Miss., 39 So. Rep. 69.

41. CRIMINAL EVIDENCE—Photographs.—Photographs of the body of defendant's victim held admissible to show the character and location of the wounds.—State v. Powell, Dela., 61 Atl. Rep. 966.

42. CRIMINAL TRIAL—Circumstantial Evidence.—While the *corpus delicti* must be proved beyond all reasonable doubt, yet it may be established by circumstantial, as well as direct, evidence.—State v. Wescott, Iowa, 104 N. W. Rep. 341.

43. CRIMINAL TRIAL—Cumulative Instructions.—Courts are not bound to give instructions which, if correct, are merely cumulative.—Miera v. Territory, N. M., 81 Pac. Rep. 586.

44. CRIMINAL TRIAL—Failure to State Case to Jury.—An objection, made after both sides had rested, that the county attorney should have stated the case to the jury before evidence was received, comes too late.—State v Harlan, Kan., 81 Pac. Rep. 480.

45. CRIMINAL TRIAL—Homicide—On trial for murder, omission to define the words "in the heat of passion" was not error, where there was no request therefor.—State v. Buffington, Kan., 81 Pac. Rep. 465.

46. CRIMINAL TRIAL—Premature Appeal.—The sending up by the clerk of appellant's "statement of case on appeal" to contradict the judge held not authorized.—State v. Dewey, N. Car., 51 S. E. Rep. 937.

47. CRIMINAL TRIAL—Presumptions on Appeal.—Where the jury is directly told not to consider certain testimony which has been stricken out, the appellate court will presume that it did not do so.—State v. Levich, Iowa, 104 N. W. Rep. 334.

48. DAMAGES—Nuisance.—The measure of damages for injury to real estate occasioned by a nuisance is the difference between the rental value of the property prior to and after the erection of the nuisance.—Gerow v. Village of Liberty, 94 N. Y. Supp. 949.

49. DEEDS—Action for Cancellation.—In a suit to set aside a deed for fraud, certain testimony as to the purchase of a mortgage on the land by defendant held irrelevant.—Hodge v. Hudson, N. Car., 51 S. E. Rep. 954.

50. DEATH—Use of Mortality Tables.—Mortality tables prepared for life insurance purposes afford little aid in determining the duration of life in actions to recover damages for wrongful death, and especially where the deceased was a colored person.—The Saginaw, U. S. D. C., S. D. N. Y., 139 Fed. Rep. 906.

51. DIVORCE—Burden of Proof as to Good Faith.—Where the issue of plaintiff's good faith is directly raised by the defendant's proof in a divorce case, the burden of meeting the issue is on the plaintiff.—Percival v. Percival, 94 N. Y. Supp. 909.

52. EVIDENCE—Ancient Documents.—Documents showing probate of will in proceedings had during Spanish control of Florida, and judicial sale of testator's land, coming from official custody of surveyor-general of the United States, are admissible in evidence as ancient documents.—McGuire v. Blount, U. S. C. C., 26 Sup. Ct. Rep. 1.

53. EVIDENCE—Bills and Notes.—In an action on a note by the payee against the maker, question asked plaintiff as to whether his agreement with defendant was different from the usual agreement in similar cases was properly excluded.—Burns v. Goddard, S. Car., 51 S. E. Rep. 915.

54. ESTOPPEL—By Contract.—Where, when one contracted to sell premises by a conveyance containing covenants against incumbrances, he was the owner of an adjacent building, he was estopped from asserting an easement in favor of such building.—Empire Realty Corp. v. Sayre, 95 N. Y. Supp. 871.

55. EQUITY—Absence of Necessary Parties.—The court cannot properly adjudicate the matters involved in the suit when it appears that necessary and indispensable parties to the proceedings are not before the court.—Florida Land Rock Phosphate Co. v. Anderson, Fla., So. Rep. 892.

56. EQUITY—Clean Hands.—Wrong doing which will defeat a recovery on the ground that a litigant does not come into equity with clean hands must be in regard to the matter in litigation.—Pitzele v. Cohn, Ill., 75 N. E. Rep. 392.

57. ESTOPPEL—Validity of Commercial Paper.—Where a bank to which nonnegotiable paper is presented for discount makes inquiries of the maker, who replied so as to induce the bank to discount the paper, he cannot afterwards deny liability, though the bank gave no notice of its action in discounting the paper.—Strang v. MacArthur Bros. Co., Pa., 61 Atl. Rep. 1015.

58. EXECUTION—Claim by Third Person.—Where chattels are levied on under an execution against one other than the owner, it is not necessary for him to give any notice of ownership to the execution plaintiff.—Mitchell v. McLeod, Iowa, 104 N. W. Rep. 249.

59. EXECUTORS AND ADMINISTRATORS—Advancements by Administrators.—An administrator without funds belonging to the estate held not bound to advance money to the estate, or buy claims against it and discharge them. —Smith v. Goethe, Cal., 82 Pac. Rep. 884.

60. EXECUTORS AND ADMINISTRATORS—Sale of Land.—The rights of a purchaser at a sale made by an executor after a *caveat* to the will had been filed is not affected where no order was made suspending further proceedings.—Carraway v. Lassiter, N. Car., 51 S. E. Rep. 968.

61. FIRE INSURANCE—Appraisal and Award.—An award made pursuant to the terms of a fire policy should not be vacated unless it clearly appears to have been made without authority, or to be the result of fraud or mistake or of the misfeasance or malfeasance of the appraisers. —Niagara Fire Ins. Co. v. Boon, Ark., 88 S. W. Rep. 915.

62. FIRE INSURANCE—Construction of Policy.—A clause in an insurance policy which is ambiguously worded, or the interpretation of which is in doubt, should be construed in favor of the insured.—Bray & Franklin v. Virginia Fire & Marine Ins. Co., N. Car., 51 S. E. Rep. 922.

63. FRAUD—Incorrect Estimate as to Value.—An executor is not liable for making an alleged false statement to one of the beneficiaries as to the value of his share in the estate; the error having arisen from a failure to foresee an advance in the value of real estate.—*In re* Cunningham's Estate, Pa., 61 Atl. Rep. 993.

64. FRAUDS, STATUTE OF—Promise to Pay Another's Debt.—A mere oral agreement by a married woman that she would see that certain lumber purchased by her husband was paid for held within the statute of frauds.—Reelman v. Grosfend, Mich., 104 N. W. Rep. 881.

65. GUARDIAN AND WARD—Laches in Bringing Action on Guardian Bond.—A defense of laches, in action on guardians' bond, must be pleaded and proved to be available, where nothing appears on the face of the complaint to show that defendants had been injured by plaintiff's delay.—Cook v. Ceas, Cal., 82 Pac. Rep. 870.

66. HIGHWAYS—Prescription.—Maintenance of a fence across a traveled road by the owner of the land hold a sufficient assertion of his rights to prevent its becoming a public highway by prescription.—State v. Cipra, Kan., 81 Pac. Rep. 488.

67. HOMESTEAD—Proceedings Reviewable.—On application for *habeas corpus*, the chancellor cannot consider the regularity of the proceedings had and order made in the circuit court in a trial of petitioner on an indictment.—Towery v. State, Ala., 39 So. Rep. 310.

68. HOMICIDE—Evidence as to Removal of Stomach in Poison Case.—On a trial for homicide by poison, a physician held competent to testify that a portion of deceased's stomach was sent to a chemist.—Nordan v. State Ala., 39 So. Rep. 406.

69. HOMICIDE—Intent.—Where defendant killed deceased deliberately, intending to do so, the length of time such intention existed was immaterial to make the offense murder.—State v. Powell, Del., 61 Atl. Rep. 966.

70. HOMICIDE—Justification.—Mere words, however abusive, will not reduce what otherwise would have been murder to manslaughter.—State v. Buffington, Kan., 81 Pac. Rep. 465.

71. HUSBAND AND WIFE—Alienation of Affections.—A wife is entitled to maintain an action for damages in her own name for the alienation of the affection of her husband, resulting in loss of conjugal society and affection —Noxon v. Remington, Conn., 61 Atl. Rep. 963.

72. HUSBAND AND WIFE—Purchase of Tax Title by Wife.—A married woman is not prohibited from purchasing tax titles on property which her husband holds under a lease.—Kampfer v. East Side Syndicate, Minn., 104 N. W. Rep. 290.

73. INDEMNITY—Unreasonable Limitation as to Time for Bringing Action.—Six months' limitation period prescribed for suit on indemnity undertaking held unreasonable and inoperative.—Ausplund v. Ætna Indemnity Co., Oreg., 81 Pac. Rep. 577.

74. INDICTMENT AND INFORMATION—Intoxicating Liquors.—A charge of maintaining a liquor nuisance held defective, and an amendment one of substance, which could not be made after defendant had pleaded and the jury had been impaneled.—State v. Bundy, Kan., 81 Pac. Rep. 459.

75. INFANTS—Appointment of Guardian Ad Litem.—An error of the clerk in appointing a guardian *ad litem* before issuance of summons is cured by the subsequent issue of summons, appearance, and answer.—Carraway v. Lassiter, N. Car., 51 S. E. Rep. 968.

76. JOINT ADVENTURE—Necessary Parties.—Persons under contract with certain promoters of corporation for shares in their profits held not necessary party in action between promoters for accounting as to property received as promotion fees.—Boice v. Jones, 94 N. Y. Supp. 896.

77. JUDGMENT—Courts of General Jurisdiction.—Courts, in the exercise of the general jurisdiction which they possess over their judgments and suitors, may proceed on motion to offset judgments rendered therein.—Coonan v. Loewenthal, Cal., 81 Pac. Rep. 527.

78. JUDGMENT—Probate Proceedings.—A judgment adverse to an alleged widow's application for homestead, determining that she was not decedent's widow at the time of his death, held *res judicata* of such issue in subsequent proceedings for distribution of the estate.—*In re* Harrington's Estate, Cal., 81 Pac. Rep. 546.

79. JUDGMENT—Vacation.—Where a judgment is open generally, and without conditions, the record of the judgment is not competent evidence in determining its validity.—Long v. Morningstar, Pa., 61 Atl. Rep. 1007.

80. JURY—Discretion of Court in Excusing Juror.—The trial court did not abuse its discretion in excusing a juror from serving in order to enable him to save his property from destruction.—Nordan v. State, Ala., 39 So. Rep. 406.

81. JURY—Right to Jury Trial in Bankruptcy Proceedings.—An action by a bankrupt's trustee, to set aside a chattel mortgage given by the bankrupt within four months of the filing of his bankruptcy petition, held an action in equity, in which the defendants were not entitled to a jury trial.—Volkommer v. Frank, 95 N. Y. Supp. 324.

82. LANDLORD AND TENANT—Damages for Failure to Heat Premises.—Loss sustained by tenant from idleness because he could not work in the leased premises for lack of sufficient heat held not the natural or probable result of the landlord's default.—Ireland v. Gauley, 95 N. Y. Supp. 521.

83. LANDLORD AND TENANT—Mortgage of Crops.—A tenant, cultivating a farm under a contract by which he is entitled to one-half the crops, may, before a division, mortgage his interest therein.—Denison v. Sawyer, Minn., 104 N. W. Rep. 305.

84. LIBEL AND SLANDER—Justification.—In an action by a public official for libel, defendant may show good faith and reasonable cause to believe the charges true.—Ferber v. Gazette & Bulletin Pub. Assn., Pa., 61 Atl. Rep. 939.

85. MASTER AND SERVANT—Assumed Risk.—In an action for injuries to a servant in a rock quarry by the sliding of a rock on the slope above him, plaintiff held to have assumed the risk.—Thompson v. California Const. Co., Cal., 82 Pac. Rep. 367.

86. MASTER AND SERVANT—Defects in Tools.—Master is not liable for injuries to a servant from appliances not recognized in their nature as dangerous.—Lynn v. Glucose Sugar Refining Co., Iowa, 104 N. W. Rep. 577.

87. MASTER AND SERVANT—Promise to Repair Defective Appliance.—Where a servant had received a promise of repair, it was not necessary for him to prove want of notice of the defect in order to recover for injuries sustained thereby.—Odin Coal Co. v. Tadlock, Ill., 75 N. E. Rep. 382.

88. MINES AND MINERALS—Title to Ore.—Title to every-

thing within the surface lines of mining claim is *prima facie* in the patentee or locator.—Ophir Silver Min. Co. v. Superior Court of City and County of San Francisco, Cal., 82 Pac. Rep. 70.

89. MORTGAGES—Amount of Debt.—Certain solicitor's fees and an interest item included in a mortgage allowed on foreclosure of the mortgage.—Pitzele v. Cohn, Ill., 75 N. E. Rep. 392.

90. MORTGAGES — Assignment. — On assignment of a bond and mortgage, the delivery of the mortgage without the bond held sufficient to put the assignee upon inquiry and charge him with notice of a former assignment.—Syracuse Sav. Bank v. Merrick, N. Y., 75 N. E. Rep. 232.

91. MORTGAGES — Declarations of Alleged Owner of Debt.—Where the debt claimed to be secured by a mortgage was not shown or proven, a declaration of a stranger that he owed the debt was incompetent as evidence.—Hodge v. Hudson, N. Car., 51 S. E. Rep. 954.

92. MORTGAGES—Deed Absolute.—A deed absolute on its face may be shown by parol to be a mortgage to secure future advances and the performance of a contract. —Stitt v. Rat Portage Lumber Co., Minn., 104 N. W. Rep. 561.

93. MORTGAGES — Enforcement. — Mortgage held not enforceable in equity, when the sole purpose of its enforcement was to cut off rights acquired by vendee in contract for the sale of the land on breach thereof by beneficial owner.—Weis v. Levy, 94 N. Y. Supp. 857.

94. MORTGAGES—Sufficiency of Assignment.—The transfer and delivery of a partnership note by one of the partners to himself as financial agent of a creditor of the partnership is effective to invest the assignee of the note with the title to the mortgage given to secure the note.—Miller v. Berry, S. Dak., 104 N. W. Rep. 311.

95. MUNICIPAL CORPORATIONS—Arbitrary Assessment for Local Improvement.—Arbitrary plan of assessing benefits to portion of lots not taken for the widening of a street held to require reversal of the assessment.—Berdel v. City of Chicago, Ill., 75 N. E. Rep. 386.

96. MUNICIPAL CORPORATIONS—Assessment for Local Improvements.—Where a new assessment is made, the question whether the original confirmation proceeding is still pending is one of fact, to be shown by the evidence.—Cratty v. City of Chicago, Ill., 75 N. E. Rep. 348.

97. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A pedestrian may assume that a city keeps its streets in a safe condition for use both by day and by night.—Gillard v. City of Chester, Pa., 61 Atl. Rep. 929.

98. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A pedestrian who uses a defective sidewalk with knowledge of its defective condition, although he might have gone by another route, is not guilty of negligence *per se*. —City of Mattoon v. Faller, Ill., 75 N. E. Rep. 387.

99. MUNICIPAL CORPORATIONS—Defective Sidewalks.—That plaintiff slipped on an approach from a street to a sidewalk held insufficient to warrant the jury in finding that the approach was negligently constructed.—Lush v. Incorporated Town of Parkersburgh, Iowa, 104 N. W. Rep. 336.

100. MUNICIPAL CORPORATIONS—Defective Sidewalks. —The reasonable care cities are bound to exercise in the inspection and maintenance of sidewalks relates so to their form as affecting the peril to which it exposes its pedestrians.—Sumner v. City of Northfield, Minn., 104 N. W. Rep. 686.

101. MUNICIPAL CORPORATIONS—Negligence of Independent Contractor.—A city held not liable as for negligence to contractors constructing a trench as part of the city's water supply system, for damages caused by the accumulation of surface water in an excavation made under an independent contract as a necessary part of such system.—Kelly v. City of New York, 94 N. Y. Supp. 872.

102. MUNICIPAL CORPORATIONS—Damages for Obstruction of Street.—A city negligently obstructing a street leading to a manufacturing plant held liable, if at all, to the increase in the cost of cartage charges in bringing to the plant the raw material and shipping the finished product.—Schleicher v. City of Mt. Vernon, 95 N. Y. Supp. 326.

103. MUNICIPAL CORPORATIONS—Street Improvement. —A mere trespasser on land dedicated as a street cannot complain of the action of the city in improving the street, on the ground that a part thereof is not within the city limits.—Backman v. City of Oskaloosa, Iowa, 104 N. W. Rep. 347.

104. MUNICIPAL CORPORATIONS — Town Bonds. — Whether plaintiff's denial of receiving a letter as to certain bonds sued on overcame the presumption arising from the mailing of the letter held for the jury.—Schmid v. Village of Frankfort, Mich., 104 N. W. Rep. 668.

105. NEGLIGENCE—Care Required on Discovering Danger.—The law does not demand that one in a place of danger shall exercise the highest degree of self-possession, coolness, and skill, but only such as an ordinarily prudent and careful person would exercise in like situation and under like circumstances.—South Chicago City Ry. Co. v. Kinnare, Ill., 75 N. E. Rep. 179.

106. NEGLIGENCE—Willfulness.—An inadvertant failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes willfulness.—Tinsley v. Western Union Telegraph Co., S. Car, 51 S. E. Rep. 918.

107. NUISANCE — What Constitutes. — The mere increased use of a right of way granted a railroad over a street over what may have originally been contemplated, resulting from the erection of a depot on land adjoining the street, held not to constitute a nuisance.—Oklahoma City & T. R. Co. v. Dunham, Tex., 88 S. W. Rep. 849.

108. PARTIES—Amendment.—In a suit to restrain payment of a judgment to the judgment creditor, complainant held properly permitted to amend so as to make assignees of the judgment parties to the controversy.—T. L. Murphy & Co. v. American Soda Fountain Co., Miss., 39 So. Rep. 100.

109. PARTITION—Confirmation of Sale.—It is not necessary that confirmation of the sale of land on partition shall appear of record by a formal order to sustain the validity of the sale, where it can be gathered from the whole record.—Cowling v. Nelson, Ark., 88 S. W. Rep. 913.

110. PARTNERSHIP—Assignment of Partnership Note.— The title to a note and mortgage owned by a partnership, though executed in favor of one of the partners, may be transferred on the indorsement of another of the partners.—Miller v. Berry, S. Dak., 104 N. W. Rep. 311.

111. PAYMENT—Acceptance of Draft.—Acceptance of a draft by a creditor from a debtor does not merge the debt or operate as a payment.—Virginia-Carolina Chemical Co. v. McNair & Pearsall, N. Car., 51 S. E. Rep. 949.

112. PAYMENT—Legacies.—To create a liability on the part of the legatee over to a remainderman, there must be proof that the legatee received the legacy. — Outlaw v. Garner, N. Car., 51 S. E. Rep. 925.

113. PLEADING—Improper Joinder.—Where a petition improperly joins two different causes of action in the same count, the remedy is by motion to elect.—McHugh v. St. Louis Transit Co., Mo., 88 S. W. Rep. 853.

114. PRINCIPAL AND AGENT—Notice to Agent.—Notice to an agent is not notice to his principal, where the party seeking to benefit by the notice conspires with the agent to conceal the facts from the principal, and defraud him.—Cowan v. Curran, Ill., 75 N. E. Rep. 322.

115. PRINCIPAL AND SURETY—Liability on Contractor's Bond.—A building contractor's surety held liable for the reasonable value of plaintiff's services in supervising the completion of the work after the contractor abandoned the same.—Donlan v. American Bonding & Trust Co., N. Car., 51 S. E. Rep. 924.

116. RAILROADS — Frightening Horses. — A railroad company is not liable for the frightening of horses resulting from the ordinary movement of its trains, but is liable on doing anything unnecessary naturally calcu-

lated to frighten horses.—Foster v. East Jordan Lumber Co., Mich., 104 N. W. Rep. 617.

117. RECEIVERS — Leases of Terminal Facilities. — A lease by a station company to a railway company for terminal facilities construed, and held that a ferry slip was to be for common use.—Pere Marquette R. Co. v. Wabash R. Co., Mich., 104 N. W. Rep. 650.

118. RECORDS—"Torrens Laws."—Laws 1905, p. 459, ch. 305, known as the "Torrens Law," § 13, providing that the state shall be made defendant where it has an interest in the land in suit, is constitutional.—*In re* National Bond & Security Co., Minn., 104 N. W. Rep. 678.

119. REFORMATION OF INSTRUMENTS — Fire Insurance Policy.—An insurance policy, like any other contract, which, because of mistake in its execution, does not conform to the real agreement of the parties, may be reformed in a court of equity.—Phœnix Ins. Co. v. State, Ark., 88 S. W. Rep. 917.

120. RELEASE—Fraud in Procurement.—Where an employer obtained a release from a father for injuries caused by the death of his son when the father was prostrated with grief, it constituted a legal fraud on the father's rights.—Erickson v. Northwest Paper Co., Minn., 104 N. W. Rep. 291.

121. REPLEVIN—Conclusiveness of Judgment.—A judgment in replevin held conclusive against an objection that the defendant by previously foreclosing a chattel mortgage on the property replevied had satisfied his lien and released the bond.—Stafford v. Baker, Mich., 104 N. W. Rep. 321.

122. SALES—Failure to Deliver at Stipulated Time.—A seller, failing to deliver the goods in time, held liable to the penalties incurred by the buyer for delay in delivering them to another.—Sutton v. Wanamaker, 95 N. Y. Supp. 525.

123. SALES—Fraud of Purchaser.—Where a purchaser makes false representations, on which the seller relies on discovering the fraud he may rescind and reclaim the property, or may continue the contract.—John Silvey & Co. v. Tift, Ga., 51 S. E. Rep. 748.

124. SALES—Refusal to Accept.—The seller cannot recover the price of goods different from those ordered, if they are refused by the purchaser.—Perkins Windmill Co. v. Kelly, Mich., 104 N. W. Rep. 663.

125. SEDUCTION — Prior Intercourse. — A request to charge that, if prosecutrix had intercourse with defendant prior to the date in question, she was not on that day a chaste woman, held properly refused. — Weaver v. State, Ala., 39 So. Rep. 341.

126. SHERIFFS AND CONSTABLES—Liability of Defendant to Indemnify Constable.—Where defendant induces a constable to deliver to him property which he has levied on, and the constable is subsequently compelled to pay its value, defendant is liable to the constable for the loss or damage sustained by him.—Turner v. Woodward, Ga., 51 S. E. Rep. 762.

127. STATUTES— Construction. — A proviso is usually restricted by construction to the subject-matter of the section of which it is a part, but may be construed as an independent provision.—Propst v. Southern Ry. Co., N. Car., 51 S. E. Rep. 920.

128. STATUTES — Entries in Legislative Journals. — A certain entry in legislative journals held no evidence, on a question of the constitutional enactment of a bill into law, that certain words were or were not in fact contained in such bill at or before its enactment into law.—West v. State, Fla., 39 So. Rep. 412.

129. STATUTES—Evidence.—In an action by a subcontractor, against the owner of a building, on a promise by the owner to pay plaintiff, it was error for the court to strike out plaintiff's testimony that he did the work on the faith of defendant's promise. — Schild v. Monroe Eckstein Brewing Co., 95 N. Y. Supp. 493.

130. STREET RAILROADS—Allowing Passengers to Alight from Moving Cars.—A city ordinance providing that conductors shall not allow ladies or children to leave or enter cars while in motion is not unreasonable or void.—McHugh v. St. Louis Transit Co., Mo., 88 S. W. Rep. 853

131. SUBROGATION—Rights of Indorsee.—An indorser on notes who has paid only a portion of them cannot claim by subrogation the right to participate in the securities held for the payment of the debt.—Bank of Fayetteville v. Lorwein, Ark., 88 S. W. Rep. 919.

132. TRADE MARKS AND TRADE NAMES — Fraudulent Representations.—A manufacturer of bitters, which in public advertisements has made false representations that they contain no intoxicating ingredients, whereas they are in fact composed of more than 40 per cent. of alcohol, is guilty of fraud, which debars it from invoking the aid of a court of equity to protect its product from alleged unfair competition.—Siegert v. Gandolfi, U. S. C. C., S. D. N. Y., 139 Fed. Rep. 917.

133. TRESPASS—Pleadings.—In trespass by a tenant against her landlord, a plea, alleging that defendant entered by and with the consent and license of the plaintiff held demurrable.—Snedecor v. Pope, Ala., 39 So. Rep. 318.

134. TRIAL—Anticipation of Defenses. — Plaintiff in framing his instructions need only present the law applicable to his theory of the case as supported by his evidence, and need not anticipate and negative possible defenses.—Kelleyville Coal Co. v. Strine, Ill., 75 N. E. Rep. 37.

135. TRIAL—Exceptions to Instructions.—An exception quoting a portion of the judge's charge, and alleging that it was error, without specifying in what particular, is too general.—Tinsley v. Western Union Telegraph Co., S. Car., 51 S. E. Rep. 913.

136. TRIAL — Findings. — A failure to find on certain issues held not error, where, in so far as the allegations were material, they were covered by the findings made. —Vestal v. Young, Cal., 82 Pac. Rep. 381.

137. TRIAL—Instructions.—A party is not entitled as a matter of right to an instruction that the jury must "weigh the evidence fairly and impartially, without partiality or passion."—Snedecor v. Pope, Ala., 39 So. Rep. 318.

138. TROVER AND CONVERSION—Measure of Damages.—The measure of damages for the conversion of household goods held the value to the owner, based on his actual money loss.—Barker v. S. A. Lewis Storage & Transfer Co., Conn., 61 Atl. Rep. 863.

139. TROVER AND CONVERSION—Title of Plaintiff.—Where stockholder assigned stock, with general power of attorney, to be used as collateral in stock speculations, and the assignee sold the stock, and lost the proceeds in speculations, trover would not lie for the stock.—Martin v. Megargee, Pa., 61 Atl. Rep. 1023.

140. TRUSTS—Construction of Will.—Under Const., art. 6, § 7, the probate court possesses exclusive original jurisdiction of a suit to construe a will, when necessary to the administration of decedent's estate.—Appleby v. Watkins, Minn., 104 N. W. Rep. 301.

141. TRUSTS—Failure to Designate Beneficiaries.—A trust failing to designate a beneficiary held unsustainable for the benefit of testator's sole heir.—Filkin v. Severin, Iowa, 104 N. W. Rep. 346.

142. WATERS AND WATER COURSES — Pollution of Stream.—The riparian owners of land along tide water river held entitled to enjoin the city from polluting the stream by discharging its sewage therein without compensation.—Doremus v. City of Paterson, N. J., 61 Atl. Rep. 396.

143. WILLS—Enforceable Interest.—Will leaving income of estate to the absolute use of testator's widow construed, and held, that his son had no interest therein, requiring the setting apart of any portion thereof to the son.—Slater v. Slater, 94 N. Y. Supp. 900.

144. WORK AND LABOR—Presumptions as to Services of Child.—Where son and mother did not live together as parent and child, there was no presumption that services rendered by the former for the latter were gratuitous.—Page v. Page, N. H., 61 Atl. Rep. 356.